IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	
	)	Chapter 13
RALPH & DEBORAH MORGAN,	)	
	)	BK No. 92-30568
Debtors.	)	
	)	
VIVIAN GAINES,	)	Chapter 13
	)	
Debtor.	)	BK No. 92-30748
	)	
ROBERT FLOYD & SUSAN CHONG REUSS,	)	Chapter 13
	)	BK No. 92-30822
Debtors.	)	
	)	
CARL & YVONNE GAMBLE,	)	Chapter 13
	)	
Debtors.	)	BK No. 92-50693
	)	
CHARLES & CYNTHIA BAKER	)	Chapter 13
	)	
Debtors.	)	BK No. 92-30767
	)	
SCOTT ANTHONY MUIR,	)	Chapter 13
	)	
Debtor.	)	BK No. 92-30825
	)	
DONALD R. CLIFTON,	)	Chapter 13
	)	
Debtor.	)	BK No. 92-30733
	)	
JAMES HURT,	)	Chapter 13
	)	
Debtor.	)	BK No. 92-30891
	)	
BRENDA LEWIS,	)	Chapter 13
	)	
Debtor.	)	BK No. 92-30882
	)	
JAMES & PATRICIA DALL,	)	Chapter 13
	)	
Debtors.	)	BK No. 92-30877
	)	
CHARLES MARBLE,	)	Chapter 13
	)	
Debtor.	)	BK No. 92-30824

SERITA SMITH,	)	Chapter 13
	)	
Debtor.	)	BK No. 92-30922
	)	
DELBERT & LORETTA SHIPP,	)	Chapter 13
	)	
Debtors.	)	BK No. 92-30908
	)	
MARK & DAWN GRAHAM,	)	Chapter 13
	)	
Debtors.	)	BK No. 92-30906

OPINION

In each of the above reference chapter 13 cases, the plan proposes to pay non-dischargeable student loan obligations in full while proposing substantially less than 100% payment on other unsecured claims. The chapter 13 trustee has filed an objection in each case on the basis that the plans unfairly classify unsecured claims. The question this Court must decide is whether a chapter 13 plan may provide for the separate classification and treatment of unsecured claims for student loan debts.

The same issue was recently addressed and decided by the United States Bankruptcy Court for the Eastern District of Missouri. In a Memorandum Opinion and Order dated November 18, 1992, a copy of which is attached, Judge Schermer sets forth a four part test to determine whether the classification scheme proposed by debtors is unfair. In a well reasoned opinion, he concludes that debtors failed to meet their burden of proving that the separate classification of student loan debts constitutes fair discrimination and is permissible under 11 U.S.C. § 1322(b)(1).

The Court agrees with the reasoning and result in Judge Schermer's

opinion and therefore adopts that opinion with respect to all of the above referenced cases. The Court further finds that debtors have not met their burden of proving that the separate classification of student loan debts is fair discrimination and is permissible under 11 U.S.C. §1322(b)(1). Accordingly, IT IS ORDERED that the trustee's objection to confirmation in each of the cases is SUSTAINED and confirmation of these plans is DENIED.

IT IS FURTHER ORDERED that debtors have ten days from the date of this order to amend their chapter 13 plans or dismiss their chapter 13 case.[1]

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: 12/2/92

[1]The question of whether a chapter 13 plan may provide for the separate classification and treatment of unsecured claims for child support will be addressed in a separate opinion. In those cases involving both student loan obligations and child support obligations (Bk. No. 92-30733 and Bk. No. 92-30824), debtors need not file an amended plan until this Court has issued its opinion on the child support question.

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

In re	)	
	)	
SARAH ALT SWEENEY	)	Case No. 92-44947-399
	)	
	)	Chapter 13
Debtor.	)	
	)	
In re	)	
	)	
ELLA M. WILLIAMS	)	Case No. 92-45083-399
	)	
	)	Chapter 13
Debtor.	)	
	)	
In re	)	
	)	
CLARICE MORRIS GROVES	)	Case No. 92-45146-399
	)	
	)	Chapter 13
Debtor.	)	
	)	
In re	)	
	)	

JOYCE BELLE HARVEL BARNEY	)	Case No. 92-45151-399
	)	
	)	Chapter 13
Debtor.	)	
	)	
In re	)	
	)	
FREDERICK E JACKSON, and	)	Case No. 92-45180-399
EARLYN J. JACKSON,	)	
	)	Chapter 13
Debtors.	)	
	)	
In re	)	
	)	
ETHEL MAE DAVIS	)	Case No. 92-45323-399
	)	
	)	Chapter 13
Debtor.	)	
	)	
In re	)	
	)	
FRANK R. MISURACA, and	)	Case No. 92-45553-399
DEBRA L MISURACA,	)	
	)	Chapter 13
Debtors.	)	
	)	Unpublished

MEMORANDUM OPINION AND ORDER

INTRODUCTION

The question before the Court in each of these unrelated cases is whether a Chapter 13 plan may provide for the separate classification and treatment of unsecured claims for student loan debts. In each of cases the Chapter 13 Trustee objected to confirmation of debtors' Chapter 13 plans on the grounds that the plans unfairly classified unsecured claims. Each plan proposed to pay non-dischargeable student loan obligations in full while proposing substantially less than 100% payment on other unsecured claims.

JURISDICTION

This Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. The parties have stipulated that this is a "core proceeding" which the Court may hear and enter appropriate judgments pursuant to 28 U.S.C. § 157(b)(2)(L).

FACTS

The facts of these cases are straight forward and essentially identical in all relevant aspects. In each of the cases the debtor or debtors filed a petition for relief under Chapter 13 of the U.S. Bankruptcy Code. 11 U.S.C. §§ 1301 - 1330 (the "Code"). Each debtor or debtors filed a Chapter 13 plan proposing to pay student loan obligations in full while paying only 10 to 40 percent of other

unsecured claims. In each case the Chapter 13 Trustee filed an objection to confirmation, alleging unfair classification of unsecured claims. Although no debtor provided testimony in explanation of separately classifying his or her student loan debts, the Court concludes that the debtors provided for the separate classification of their student loan claims because these obligations, unlike their other unsecured claims, are non-dischargeable under § 1328(a)(2) and § 523(a)(8).

DISCUSSION

Section 1322(b)(1) of the Code allows a Chapter 13 plan to designate a class or classes of unsecured claims consistent with § 1122 of the Code as long as the plan does not discriminate unfairly against any such designated classes. Thus, a Chapter 13 debtor may place unsecured claims in separate classes as long as the classification 1) complies with § 1122 of the Code and 2) does not result in unfair discrimination between the claims grouped separately. In re Lesser, 939 F.2d 669, 671 (8th Cir. 1991).

We turn first to the requirements of § 1122. Section 1122 specifies in relevant part that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a) (1989). Thus, § 1122 designates when claims may be classified together. It does not, however, state whether substantially similar claims must be placed in the same class or whether they may be placed in separate classes. The Eighth Circuit, however, has considered this issue and held that similar claims may be classified

separately because nothing in the Code "prohibit[s] the placement of substantially similar claims in different classes." Hanson v. First Bank of South Dakota, N.A., 828 F.2d 1310, 1313 (8th Cir. 1987). In addition, to conclude that § 1122 prohibits Chapter 13 plan from classifying student loan obligations separately from other unsecured claims would conflict with the plain language of § 1322(b)(1). Section 1322(b)(1) clearly states that a Chapter 13 plan may "designate ... classes of unsecured claims." Therefore, the separate classification of debtors' unsecured student loan debts does not violate § 1122.

Having determined that Chapter 13 plan may separately classify student loan debts, the Court must next determine whether such classification results in unfair discrimination between student loans and other unsecured claims. Section 1322(b)(1) prohibits unfair discrimination between classes of unsecured claims. While the Code does not define what constitutes unfair discrimination within the meaning of § 1322(b)(1), courts have developed a four part test to determine whether a proposed classification scheme is unfair. In determining the fairness of separate classes, courts have considered:

> (1) Whether the discrimination has a reasonable basis;
>
> (2) Whether the debtor can carry out a plan without such discrimination;
>
> (3) Whether such discrimination is proposed in good faith; and
>
> (4) The treatment of the class discriminated against.

In re Storberg, 94 B.R. 144, 146 (Bankr. D.Minn. 1988) citing, In re

Dziedzic, 9 B.R. 424, 427 (Bankr. S.D.Tex. 1981).[2] The burden is on the debtor to prove that the classification is not discriminatory. In re Foreman, 136 B.R. 532, 534 (Bankr. S.D.Iowa 1992).

1. Reasonable Basis for Discrimination

The first element of this test is whether a reasonable basis exists to justify the discrimination. Prior to the amendments to § 1328(a)(2)[3], Courts held that the possible non-dischargeability of a student loan in a Chapter 7 case did not provide a reasonable basis for the different treatment of that loan from obligations due other unsecured creditors for the purposes of a Chapter 13 plan. In re Cronk, 131 B.R. 710, 712 (Bankr. S.D.Iowa 1990); In re Furlow, 70 B.R. 973 (Bankr. E.D.Pa. 1987); In re Lawson, 93 B.R. 979 (Bankr. N.D.Ill. 1988) (discrimination that benefits only a creditor without benefit to the debtor is unreasonable and thus unfair). The fact that student

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[2]The Eighth Circuit in In re Leser, 939 F.2d 669 (8th Cir. 1991) referred to, but did not base its decision on this four point test.

[3]The Amendments to § 1328(a)(2) provided that student loans in Chapter 13 cases filed after November 5, 1990, would be dischargeable only if the requirements of § 523(a)(8) were met. Section 523(a)(8) provides that "[a] discharge under §727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless --
>
> > (A) such loan, . . . first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
> > (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

loan obligations are now non-dischargeable in a Chapter 13 case unless either provision of § 523(a)(8) is met, has been held in our circuit to be an insufficient basis for favoring student loan creditors over other unsecured creditors. See, In re Tucker, 130 B.R. 71 (Bankr. S.D.Iowa 1991); In re Scheiber, 129 B.R. 604 (Bankr. D. Minn. 1991); In re Saulter, 133 B.R. 148 (Bankr. W.D.Mo. 1991). One court explained the unfairness in allowing non-dischargeability as a rationale for discrimination by stating that permitting classification on this basis alone enables the debtor "to exit bankruptcy free of student loan liability at the expense of other unsecured creditors. In essence . . . [the debtor] shifts the student loan non-dischargeability burden from herself onto her general unsecured creditors." Saulter, 133 B.R. at 149. In Saulter, Chief Judge Koger concluded that such a rationale is not a reasonable basis for discriminatory treatment. Thus, to establish a rational basis for discriminating in favor of student loan obligations a debtor must show that there is some reasonable basis for the discrimination beyond the fact that the student loan obligation is non-dischargeable.

Debtors bring to the Court's attention the fact that the Eighth Circuit recently upheld confirmation of a Chapter 13 plan which separately classified non-dischargeable child support obligations from other unsecured obligations. Debtors maintain the treatment of non-dischargeable child support obligations in Leser supports their position that non-dischargeable student loans may also be separately classified and given favorable plan treatment. However, the persuasive factor for the Eighth Circuit, and the bankruptcy court from which the

Eighth Circuit adopted its rationale for allowing separate classification of child support claims, was not the fact that the child support obligations were non-dischargeable, but rather was the overwhelming public policy in favor of providing support for children. Leser, 939 F.2d at 672; citing, In re Storberg, 94 B.R. 144, 147 (Bankr. D.Minn. 1988).

In Storberg, Chief Judge Kressel explained that the public policy favoring payment of child support obligations was clearly manifested in the numerous state and federal statutes which provide special treatment for the collection of child support obligations. Judge Kressel identified several Minnesota statutes providing special procedures for obtaining support judgments and enforcing or collecting support awards. Missouri statutes contain similar provisions favoring payment of child support. See e.g. Mo. Ann. Stat. §§ 454.010 - 454.360 (Vernon 1896) (Supp. 1992) (Reciprocal Enforcement of Support Law); § 454.400 (Child Support, Enforcement by State); and § 525.030 (wages subject to garnishment for child support).

Similarly, the Bankruptcy Code contains certain provisions specially favoring child support claimants. For example, the Code makes child support obligations non-dischargeable (§ 523(a)(5)), and excepts from the automatic stay collection of child support obligations from property that is not property of the estate. See, 11 U.S.C. § 362(b)(2). There are, however, no analogous state or federal statues evidencing such a strong public policy in favor of the payment of student loan obligations. While Congress has amended § 1328(a)(2) to make student loans generally non-dischargeable in a Chapter 13 case,

this provision alone does not evidence a position as favored in public policy as is the payment of child support obligations. In re Scheiber, 129 B.R. 604, 606 (Bankr. D.Minn. 1991). Therefore, unlike child support claims, some additional rationale is necessary to justify separate classification of student loan obligations.

2. Can Debtors carry out their Plans without the Discrimination

The Eighth Circuit and the bankruptcy courts which addressed separate classification of child support claims allowed the discrimination in favor of child support claimants because, in light of the public policy favoring payment of child support, they could not conceive of confirming a Chapter 13 plan which did not provide for payment in full of such obligations. As a practical matter then, separate classification had to be permitted to enable debtors to pay child support claims in full unless the debtors were able to pay all unsecured claims in full.

With respect to student loan obligations, however, public policy does not dictate full payment of such debts during the life of the plan. Thus, there is nothing to stop a debtor from carrying out a Chapter 13 plan without separate classification of these claims. The debtor need only formulate a plan which pays student loan debts pro rata with other unsecured creditors during the life of the plan and as continuing obligation thereafter. Alternatively, the debtor may treat the student loan obligation as a long term indebtedness under §1322(b)(5), curing arrearages within a reasonable time and thereafter maintaining regular payments. While such plan treatment may result in the debtor emerging from his Chapter 13 plan with a continuing

obligation which may impede the debtor's fresh financial start,[4] such an imposition may be the result envisioned by Congress in amending § 1328(a)(2) to make student loans non-dischargeable in a Chapter 13 case unless the debtor can demonstrate the debt should be dischargeable under either provision of § 523(a)(8). Absent a showing that discriminatory treatment is necessary for the debtor to complete his Chapter 13 plan, separate classification of student loan and general unsecured obligations cannot be permitted under the Bankruptcy Code.

CONCLUSION

Based upon the foregoing discussion of two of the four prongs of the Storberg analysis, the Court concludes that the debtors have not met their burden of proving that the separate classification of student loan debts in the instant cases is fair discrimination and is permissible under § 1322(b)(1)[5]. Accordingly,

IT IS ORDERED that Trustee's objection to confirmation in each of the above cases is SUSTAINED and confirmation of these plan is DENIED.

IT IS FURTHER ORDERED that debtors have 10 days from the date of this Opinion and Order to amend their Chapter 13 plans or dismiss their Chapter 13 case.

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[4]The Court notes that while one of the goals of bankruptcy is to provide the debtor with a fresh start, bankruptcy also offers creditors fair treatment of their claims. Local Loan Co. v. Hunt, 292 U.S. 234 (1934).

[5]Debtors in the instant proceedings have failed to meet their burden of proof under the first two elements of the Storberg test. Accordingly, the Court does inquire into the third and fourth points.

/s/ BARRY S. SCHERMER

United States Bankruptcy Judge

Dated: November 18, 1992

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